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No. 92-253

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioner,

-vs-

MARVIN FLOWERS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Should the Court decline to review the Seventh Circuit's decision where the State has not shown that the decision will have widespread impact or that it will affect more than a few cases?

II. Should the Court decline to review the State's argument that the jury instructions in this case comported with due process where the State conceded, in both the district court and in the court of appeals, that the instructions violated due process and where the argument is without merit?

III. Should the Court decline to review the State's argument, based on Teague v. Lane, 489 U.S. 288 (1989), that a prior decision of the Seventh Circuit, Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), should be denied retroactive effect where the State repeatedly elected not to raise this argument in previous habeas cases and where the State's claim lacks merit?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

A copy of the relevant decisions including the May 7, 1992, decision of the United States Court of Appeals for the Seventh Circuit are appended to the certiorari petition.

JURISDICTION

This Court maintains jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In its statement of the case, the State writes, "An Illinois jury found Flowers guilty of murder, armed violence and armed robbery on October 11, 1980." State's Petition at 3. While this is accurate as far as it goes, it should be noted that, having received the instructions at issue here, the twelve jurors also initially returned a verdict finding Marvin Flowers guilty of voluntary manslaughter. The trial judge refused to accept both the murder and manslaughter verdicts, gave the jury supplemental oral instructions, and sent the jury back for further deliberations. When the jury, apparently confused by the instructions, returned without reaching a verdict, the trial

judge gave additional oral instructions and sent the jury to deliberate a third time. The jury then returned with a murder verdict but without the manslaughter verdict. The trial judge accepted the murder verdict and subsequently entered judgment on it.

REASONS FOR DENYING CERTIORARI

I

THIS COURT SHOULD DENY THE STATE'S PETITION FOR CERTIORARI BECAUSE THE STATE HAS GROSSLY EXAGGERATED THE IMPACT OF THE SEVENTH CIRCUIT'S DECISION.

In its reasons for granting the writ, the State contends that the Seventh Circuit's decision in this case is "momentous" and has "ominous national implications." State's Petition at 5. The State further implies that a "calamity" will befall the State of Illinois if the appellate court's decisions in this case and in Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992) are allowed to stand because hundreds of murderers convicted over the past twenty years will be set free. State's Petition at 5-6. Neither claim by the State is well-founded.

First, the State's suggestion that the Seventh Circuit's decisions will affect hundreds of murder convictions appears hyperbolic to say the least. Despite the State's suggestion to the contrary, the deficient murder instructions were not given routinely over the span of twenty years. Between 1961 and 1981,

the prevailing case law and the pattern jury instructions did not suffer from the deficiency identified in Falconer v. Lane, 905 F. 2d 1129 (7th Cir. 1990). Rather, the pattern jury instructions which the Seventh Circuit concluded violated due process were promulgated in 1981 with the publication of the second edition of Illinois Pattern Instructions Criminal (IPI Criminal 2d ed. 1981). Effective July 1, 1987, the entire statutory scheme was amended, abolishing the former offenses of murder and manslaughter and creating the offenses of first and second degree murder in their place. The jury instructions were completely revised to reflect the new scheme. Then, in 1988, the Illinois Supreme Court invalidated the previous murder-manslaughter instructions in People v. Reddick, 123 Ill. 2d 184, 526 N.E.2d 141 (1988). Thus, the Seventh Circuit's decision will apply primarily to murder convictions obtained during the six or seven year period between 1981 and 1987-88.[1]

However, not even all murder convictions between 1981 and 1988 will be affected by the appellate court's ruling. The appellate court's decision will have no impact upon murder convictions where a jury was not instructed on voluntary manslaughter. Where murder convictions were attained on pleas of guilty, where murder convictions were secured in bench trials, or

[1] Respondent's case is somewhat of an anomaly in that he was tried prior to 1981 when Illinois' pattern murder instruction did not suffer from the defect identified in Falconer. In Flowers' case, the trial judge simply did not give the pattern instructions in effect but for some reason gave non-pattern instructions which coincidentally happened to suffer from the same defect as the later pattern instructions.

where defendants presented no colorable case for voluntary manslaughter sufficient to warrant an instruction (which would presumably include most death penalty cases), the Seventh Circuit's decision will have no application whatsoever.

As evidence of the fact that the Seventh Circuit's decision will have limited effect, to date there are only five reported appellate court cases (including this case) where defendants have sought and obtained habeas relief on the basis of the unconstitutional murder instruction. See Falconer v. Lane, 905 F. 2d 1129 (7th Cir. 1990); Rose v. Lane, 910 F.2d 400 (7th Cir. 1990); United States ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991) Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992); Illinois Department of Corrections v. Flowers, 962 F.2d 703 (7th Cir. 1992). As further evidence that the State's claims of statewide disaster are overstated, it should be noted that the State did not even bother to file petitions for certiorari in Falconer or Fleming and failed to raise any retroactivity issue in Falconer, Rose, or Fleming. The State's prior indifference to the holding of Falconer and its retroactive application is difficult to reconcile with its present claim that the decisions are "ominous", "calamitous," and "momentous."

Second, the State fails to explain what national implications are involved here. The Seventh Circuit's decision held that a murder instruction given primarily over a seven year period in a limited number of murder cases violated due process. Why a decision dealing with the retroactive effect of a murder

instruction unique to Illinois is likely to have nationwide effect is unclear. Because the State's hyperbolic claims concerning the effect of the Seventh Circuit's decision are unwarranted and because it appears that the decision will affect relatively few cases, the State's petition for certiorari should be denied.

II.

THIS COURT SHOULD REJECT THE STATE'S CLAIM THAT NO DUE PROCESS VIOLATION OCCURRED BECAUSE THE STATE CONCEDED BEFORE BOTH THE DISTRICT COURT AND THE COURT OF APPEALS THAT THE INSTRUCTIONS AT ISSUE HAD, IN FACT, VIOLATED DUE PROCESS AND BECAUSE THE ARGUMENT FAILS ON THE MERITS.

In its Petition for Writ of Certiorari, the State of Illinois asks this Court to grant certiorari "to resolve a circuit split on the proper scope of the due process clause." (State's Petition at 5). This constitutional issue was never raised by the State in either the district court or the Seventh Circuit. Because the State has provided no excuse for not having raised this issue in the court below, this Court should deny the petition. See Patrick v. Burget, 486 U.S. 94, 99, n.5 (1988) citing Youakim v. Miller, 425 U.S. 231, 234 (1976) (Per curiam).

The opinion of the district court below explicitly states "As respondent concedes, [United States ex rel.] Fleming [v. Huch], 924 F. 2d 679 [(7th Cir. 1991)] puts to rest any question

that the initial written instructions did not violate due process because they were inherently confusing." United States ex rel. Flowers v. Illinois Department of Corrections, 767 F. Supp. 880, 892 (N.D. Ill. 1991). Moreover, the Seventh Circuit's opinion likewise noted that Illinois conceded this point. See Flowers v. Illinois Department of Corrections, 962 F.2d 703, 705 (7th Cir, 1992). This failure of the State to challenge the constitutionality of the written instructions below militates in favor of denying the petition for certiorari. Patrick, 486 U.S. at 99, n.5 ("This court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court"); Adickes v. Kress & Co., 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them") citing Lawn v. United States, 355 U.S. 339, 362-3, n.16 (1958); Husty v. United States, 282 U.S. 694, 701-02 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927).

The State's decision to forego this argument before the lower courts speaks volumes on the merits of the claim. Moreover, the Seventh Circuit's opinion in Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992), authored by Judge Flaum and joined in by Judges Posner and Manion, fully explains the due process violation in this case. See Taylor, 954 F.2d at 450.

The thrust of the State's belated due process argument is that the Seventh Circuit, in disregard of this Court's prior

decisions, announced that criminal defendants are entitled to correct jury instructions on affirmative defenses. See State's Petition at 6, 13-19. The State argues that this holding is incorrect under this Court's decisions in Patterson v New York, 432 U.S. 197 (1977), Engle v. Isaac, 456 U.S. 107 (1982), and Martin v. Ohio, 480 U.S. 228 (1987).

This argument is premised on distortions both of the issue in this case and of the Seventh Circuit's holding. The instruction challenged in this case was not the instruction on voluntary manslaughter, which in Illinois acted in some respects as a partial affirmative defense (although it was also a completely separate offense). Marvin Flowers has never claimed that the voluntary manslaughter instruction was erroneous, confusing, or constitutionally deficient. It was the murder instruction which was challenged in this case and it was the murder instruction which the Seventh Circuit held unconstitutional. The State ignores this salient fact in an attempt to bring this case within Patterson, Engle, and Martin when those cases dealing with instructions on affirmative defenses are not on point.

The State's failure to raise any due process issue in the lower courts and the argument's lack of merit warrants a denial of its petition for certiorari.

III.

THIS COURT SHOULD REJECT THE STATE'S BELATED ATTEMPT TO

APPLY TEAGUE V. LANE, 489 U.S. 288 (1989), TO FALCONER V. LANE, 905 F. 2D 1129 (7TH CIR. 1990), BECAUSE THE STATE FAILED TO RAISE THE ISSUE IN THREE PRIOR CASES, INCLUDING FALCONER V. LANE AND BECAUSE THE CLAIM LACKS MERIT.

The centerpiece of the State of Illinois' Petition for Certiorari is a Teague v. Lane, 489 U.S. 288 (1989), attack on Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), a two year-old Seventh Circuit habeas corpus decision. This Court should deny the petition for certiorari because the State of Illinois failed to raise this Teague challenge in the Falconer case itself. Moreover, the State of Illinois failed to raise Teague v. Lane in two subsequent Seventh Circuit decisions granting writs of habeas corpus on the basis of Falconer. Denying the State of Illinois' petition will show that the State may not pick and choose when to raise a Teague v. Lane challenge.

In the case at bar, the Seventh Circuit applied existing precedent--its holding in Falconer v. Lane, 905 F. 2d 1129 (7th Cir. 1990--in granting a writ of habeas corpus. Flowers, 962 F.2d at 705. In its Petition for Writ of Certiorari, the State of Illinois is now asking this Court to hold that the granting of the writ of habeas corpus in Falconer was barred by this Court's decision in Teague. Note that the State is not claiming that the opinion in the case at bar created a new rule under Teague; rather, it is claiming that Falconer--a decision over two years old--violated Teague.

Interestingly, the State of Illinois never raised a Teague

issue in Falconer. The failure to raise the issue two years ago is proof that the State's position is untenable. Yet to appreciate fully the audacity of the State's position, it is important to understand the chronology of events affecting these issues.

On February 22, 1989, this Court decided Teague v. Lane, which held that new rules of criminal procedure should generally not be applied retroactively to cases on collateral review. This Court characterized retroactivity as a "threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." Teague, 489 U.S. at 300. This Court has held that the Teague rule is not "jurisdictional" in the sense that a court must raise and decide the issue sua sponte. See Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 2718, 111 L. Ed. 2d 30 (1990). Rather, the goal of Teague is to prevent "'selective application of new rules [thus] violat[ing] the principle of treating similarly situated defendants the same'." Teague, 489 U.S. at 304, quoting Griffith v. Kentucky, 479 U.S. 314, 323-324 (1987) citing Desist v. United States, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting).

As shown below, the State's belated Teague claim subverts the goal of Teague--similar treatment for similarly situated defendants.

The State of Illinois filed its brief in Falconer v. Lane on

October 13, 1989. Note that this is almost eight months after Teague v. Lane was decided. Its brief makes no mention of Teague v. Lane. Oral argument in Falconer was held February 26, 1990--over one full year after Teague v. Lane was decided. Again, the State of Illinois apparently made no use of Teague v. Lane. Indeed, in its opinion in Falconer the Seventh Circuit pointedly noted that the State had failed to raise a Teague v. Lane claim, thus obviating any need to even discuss the case. Falconer v. Lane, 905 F.2d at 1137.

Obviously, the State felt that Teague was inapplicable to a Falconer claim. Any lingering doubt on this score had to be removed when the Seventh Circuit relied on Falconer in granting a habeas corpus petition in Rose v. Lane, 910 F.2d 400 (7th Cir. 1990), cert. denied, 111 S.Ct. 515 (1990), and United States ex rel. Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991). Both cases concerned the same faulty Illinois jury instructions; both decisions relied on Falconer in granting relief; in neither case did the State of Illinois raise a Teague v. Lane claim.

The State of Illinois long ago lost the right to raise a Teague claim against the Falconer decision. Granting this petition would allow a State to flout the holding of Teague v. Lane by arbitrarily discriminating among similarly situated defendants. Granting this petition would open the door to a defendant's claim that the State had an "improper motive" in singling him out for a Teague v. Lane claim.

The State's decision not to make a Teague argument in case

after case illustrates the weakness of the claim. In this Court, the State argues that Falconer was a new rule and that Judge Easterbrook's disagreement with Falconer two years after the fact is proof that Falconer was not "dictated" by prior precedent. State's Petition at 12. The State also seems to contend that, if there is any contrary authority, the decision must be considered new within the meaning of Teague.

This Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989), demonstrates that this approach is wrong. Both the Texas Court of Criminal Appeals and the Fifth Circuit had rejected petitioner's claim in Penry. Nevertheless, this Court agreed with the claim and then held that it was dictated by previous precedent and that the opposite conclusion was not a reasonable, good faith interpretation of the precedents. Thus, simply because there may be disagreement on the constitutionality of a certain procedure, this does not necessarily establish that a constitutional rule is new.

Additionally, it must be noted that the State's Teague argument is based on the same fundamental distortion of the issue in this case as is its due process argument. See supra at 8. The State claims that other circuit courts of appeal have expressly rejected the Falconer and Taylor court's reasoning, citing Allen v. Redman, 858 F.2d 1194 (6th Cir. 1988); Wood v. Marshall, 790 F.2d 548 (6th Cir. 1986), cert. denied, 479 U.S. 1036 (1987); Walker v. Endell, 850 F.2d 470 (9th Cir.), cert. denied, 488 U.S. 926 (1988). State's Petition at 18-19. As each

of those cases was decided before either Falconer or Taylor, it is difficult to see how they expressly rejected the reasoning of Falconer and Taylor. More importantly, however, each of those cases dealt with a defendant's due process right to instructions on an affirmative defense. It bears repeating that it is not the constitutionality of the voluntary manslaughter instruction or the defendant's right to such an instruction that is at issue here. Rather it is the validity of the murder instruction.

Finally, even if Falconer announced a new rule, the new rule falls squarely within one of the exceptions to non-retroactivity recognized in Teague and its progeny. The relevant exception provides for retroactive application of watershed rules of criminal procedure which affect "fundamental fairness" and go to "the likelihood of obtaining an accurate conviction. Teague v. Lane, 489 U.S. 288, 312 (1989); Sawyer v. Smith, 110 S. Ct. 2822, 111 L. Ed. 2d 193, 211 (1990); Butler v. McKellar, 494 U.S. 407 (1990).

In the present case, the Falconer error (the absence of any reference to the presence or absence of an unreasonable belief of justification in the murder instruction) undermined the accuracy of the fact-finding process in a fundamental way. The jury, in finding the defendant guilty of voluntary manslaughter (see Respondent's Statement of the Case, supra at 2) found beyond a reasonable doubt the presence of an unreasonable belief of justification--meaning it found a fact incompatible with a conviction for murder. Nevertheless, it signed a murder verdict

in accordance with a murder issues instruction which took no account of the presence of absence of an unreasonable belief of justification. One could hardly imagine an error that goes more to the accuracy or the fundamental fairness of the procedure. Flowers argued below that this exception to Teague applies to him and the State makes no argument to the contrary in its petition.

Because the State has chosen to invoke Teague in a random, arbitrary manner, because its argument on the merits is ill-founded, and because, given the unique facts of his case, Marvin is entitled to relief under one of Teague's exceptions, this Court should deny the State's petition for a writ of certiorari.

CONCLUSION

For these reasons, respondent Marvin Flowers submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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